Apple SoCal, LLC d/b/a Applebee's, Apple American Group II, LLC d/b/a Applebee's and Apple American Group, LLC *and* Samuel Y. Rodriguez. Case 31−CA−185387

December 4, 2018

DECISION AND ORDER REMANDING

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

Pursuant to a charge and amended charges filed by Samuel Y. Rodriguez, the General Counsel issued a complaint on June 29, 2017. The complaint alleges that the Respondents have maintained and enforced a mandatory arbitration agreement that unlawfully restricts employees' statutory right to pursue class or collective actions in violation of Section 8(a)(1) of the National Labor Relations Act. The complaint also alleges that the mandatory arbitration agreement includes language that employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board. On May 2, 2018, the Respondents filed a Motion for Partial Summary Judgment and a supporting brief, with exhibits attached. The Respondents contend that the allegation that the arbitration agreement includes language that employees would reasonably conclude prohibits or restricts their right to file charges with the Board should be dismissed as untimely under Section 10(b) of the Act. The General Counsel filed a brief in opposition to the Respondents' motion, and the Respondents filed a reply brief.

On July 2, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the Respondents' motion should not be granted in favor of either party with respect to the 10(b) issue. The General Counsel filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Partial Summary Judgment

The General Counsel and the Respondents agree, and we find, that there are no disputed issues of fact warranting a hearing with respect to the10(b) issue and that the 10(b) issue can be resolved on the basis of the pleadings before the Board.

The undisputed facts are as follows. Charging Party Samuel Y. Rodriguez worked for Respondent Apple SoCal, LLC d/b/a Applebee's (Apple SoCal) from about July 29, 2011, through about November 27, 2011, at its Azusa, California location. Rodriguez subsequently worked for Apple SoCal from about December 29, 2011, through about March 24, 2013, at its Rancho Cucamonga, California location. On July 30, 2011, as a condition of his employment, Rodriguez signed a Receipt of Dispute Resolution Program and Agreement to Abide by Dispute Resolution Program (Agreement), which incorporated the terms of the Respondents' Dispute Resolution Program Booklet (Booklet) (collectively, the 2011 Booklet and Agreement). The 2011 Booklet and Agreement require employees, as a condition of their employment, to agree to submit employment-related claims or disputes to binding arbitration, and they stipulate that arbitration will be on an individual basis and not as a class or collective action.

On about September 28, 2015, Rodriguez filed a complaint in Los Angeles County Superior Court on behalf of himself and others similarly situated against Respondents Apple American Group and Apple American Group II, LLC (Apple American Group II) alleging unlawful business practices. On about June 9, 2016, Apple American Group and Apple American Group II filed in the same court a petition to compel individual arbitration and stay judicial proceedings in accordance with the terms of the 2011 Booklet and Agreement. On about July 7, 2016, the Superior Court granted the Respondents' petition.

On September 29, 2016, Rodriguez filed the initial charge in this proceeding, alleging, in relevant part, that Apple American Group and Apple American Group II violated Section 8(a)(1) of the Act by requiring employees, "as a condition of employment, to agree to a mandatory arbitration provision which included a class action waiver," and by moving "to compel individual arbitration pursuant to the terms of the agreement."

On January 17, 2017, Rodriguez filed an amended charge alleging that the same Respondents violated Section 8(a)(1) by "maintain[ing] and enforc[ing] an arbitration agreement that precludes employees from collective action in all forums, arbitral and judicial," and further alleging, for the first time, "that employees would interpret [the arbitration agreement] to prohibit access to the Board."[1]

Thereafter, on June 29, 2017, the General Counsel issued the instant complaint, alleging that the Respondents

[1] On March 30, 2017, Rodriguez filed a second amended charge adding Apple Mid Cal II, LLC as a respondent. On April 26, 2017, Rodriguez filed a third amended charge removing Apple Mid Cal as a respondent, adding Apple SoCal as a respondent, and modifying the operative language to allege that the Respondents "maintained and/or enforced an arbitration agreement that precludes employees from collective action in all forums, arbitral and judicial, that employees would interpret to prohibit access to the Board."

violated Section 8(a)(1) of the Act by maintaining and enforcing the 2011 Booklet and Agreement, both because they require employees, as a condition of employment, to waive their right to maintain class or collective actions in all forums, and because they would reasonably be construed by employees to preclude them from, or restrict them in, filing unfair labor practice charges with the Board.

On July 26, 2017, the Regional Director for Region 31 issued an order withdrawing and placing in abeyance the complaint allegations predicated on the class- and collective-action waivers in the 2011 Booklet and Agreement, pending the Supreme Court's decision in *Murphy Oil USA, Inc.,* 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), affd. sub nom. *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018).[2]

In support of their Motion for Partial Summary Judgment on the remaining complaint allegation—that employees would reasonably construe the 2011 Booklet and Agreement to restrict their right to file charges with the Board—the Respondents contend that this allegation should be dismissed as untimely under Section 10(b) of the Act because they did not maintain or enforce the 2011 Booklet and Agreement in the 6 months prior to the filing of the January 17, 2017 amended charge. According to the Respondents, they maintained the 2011 Booklet and Agreement from April 2011 through sometime in 2014,[3] and they last enforced those documents on June 9, 2016, when they filed the petition to compel individual arbitration and stay judicial proceedings in the class-action litigation brought by Rodriguez.[4] However, the charge was not amended to allege that the 2011 Booklet and Agreement would reasonably be interpreted to prohibit access to the Board until January 17, 2017, more than 6 months after the Respondents had either maintained or enforced these documents.

In his opposition brief and response to the Notice to Show Cause, counsel for the General Counsel maintains that, even assuming the limitations period expired 6 months after the Respondents last enforced the 2011 Booklet and Agreement, the allegation in the January 17, 2017 amended charge is not time barred because it is closely related to the allegations in the original, timely filed charge. We agree.

Section 10(b) of the Act provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Thus, in general, an unfair labor practice charge filed more than 6 months after the alleged unfair labor practice took place is untimely. The Board has held, however, that "'the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended charge which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge. Amended charges containing such allegations, if filed outside the 6-month 10(b) period, are deemed, for 10(b) purposes, to relate back to the original charge.'" *WGE Federal Credit Union*, 346 NLRB 982, 983 (2006) (quoting *Pankratz Forest Industries*, 269 NLRB 33, 36-37 (1984), enfd. mem. sub nom. *Kelly-Goodwin Hardwood Co. v. NLRB*, 762 F.2d 1018 (9th Cir. 1985)).

In determining whether an amended charge relates back to an earlier charge for 10(b) purposes, the Board applies the three-prong "closely related" test set forth in *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).[5] The Board considers (1) whether the otherwise untimely allegations of the amended charge involve the same legal theory as the allegations in the timely charge, and (2) whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge. The Board may also consider (3) whether a respondent would raise the same or similar

[2] In *Epic Systems*, a consolidated proceeding including review of court decisions in *Lewis v. Epic Systems Corp*., 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil*, supra, the Supreme Court held that employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration do not violate the National Labor Relations Act and must be enforced as written pursuant to the Federal Arbitration Act. 584 U.S. at __, 138 S. Ct. at 1619−1621, 1632.

[3] Starting in 2014, the Respondents distributed a revised Booklet and Agreement to newly hired employees. The revised Booklet and Agreement are not at issue in this case.

[4] The Respondents make contradictory claims concerning the date they last enforced the 2011 Booklet and Agreement. However, the Respondents acknowledge that on June 9, 2016, they filed a petition to compel individual arbitration and stay judicial proceedings in accordance with the terms of the 2011 Booklet and Agreement in the class-action litigation brought by Rodriguez.

[5] The Respondents urge the Board to reexamine *Redd-I* in light of the Supreme Court's decisions in *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007), overturned due to legislative action U.S. Pub. L. No. 111−2 (2009), and *Nat'l. R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 104−105 (2002). The issues addressed by the Court in *Ledbetter* and *Morgan* are factually and legally distinct from the issue addressed by the Board in *Redd-I.* In *Ledbetter*, the Court rejected the suggestion that a neutral employment practice occurring within the statutory limitations period is actionable under Title VII if it gives effect to a discriminatory act that occurred outside the limitations period. 550 U.S. at 632. In *Morgan*, the Court distinguished between continuing violations and discrete discriminatory acts under Title VII, and it rejected the lower court's holding that so long as one discrete discriminatory act falls within the charge-filing period, that act and all discriminatory acts sufficiently related to it—no matter how long ago they occurred—constitute a continuing violation and may be considered as such for purposes of liability. 536 U.S. at 114.

defenses to both the untimely and timely charge allegations. *Redd-I*, supra.

Here, all three prongs of the *Redd-I* test are satisfied. With respect to the first prong, the otherwise untimely charge allegation involves the same section of the Act (Section 8(a)(1)) as the timely charge allegation, and at the time the charges were filed, both allegations would have been analyzed under the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).[6]

Turning to the second factor, the otherwise untimely allegation arises from the same factual situation or sequence of events as the timely allegations. All are based on the Respondents' maintenance and enforcement of the 2011 Booklet and Agreement. The 2011 Agreement expressly provides that it "shall survive the termination of [the signatory employee's] employment." Moreover, by asserting the 2011 Booklet and Agreement as an affirmative defense in the class-action litigation brought by Rodriguez, the Respondents reaffirmed their intent to maintain the 2011 Booklet and Agreement as to him. The Respondents' efforts to distinguish between the maintenance and enforcement of the class- and collective-action waiver, on the one hand, and on the other the maintenance of the allegedly overbroad language restricting employees' access to the Board are unpersuasive. Given the Respondents' assertion of the 2011 Booklet and Agreement in the class-action litigation, Rodriguez would reasonably believe that the Respondents were continuing to maintain the *entire* 2011 Booklet and Agreement, including the allegedly overbroad language restricting employees' access to the Board.[7]

As for the third prong—whether a respondent would raise the same or similar defenses to the timely and otherwise untimely allegations—it is only necessary for this part of the test that the defenses be similar, not that they be identical. At the time the charge and amended charges were filed, the Respondents would have relied on similar defenses and evidence: the Federal Arbitration Act, the language of the 2011 Booklet and Agreement, and whether that language, reasonably construed, would interfere with the exercise by employees of their Section 7 rights. Although the defenses that the Respondents would raise have subsequently changed in light of the Supreme Court's decision in *Epic Systems*, supra, and the Board's decision in *Boeing*, supra, this is due to the issuance of those decisions, not to the filing of amended charges by Rodriguez.

In sum, we find that the otherwise untimely allegation that the 2011 Booklet and Agreement would reasonably be interpreted to prohibit access to the Board is closely related to the allegations in the timely filed initial charge and thus is not barred by Section 10(b). Accordingly, we deny the Respondents' Motion for Partial Summary Judgment.

Ruling on General Counsel's Request for Summary Judgment

In his brief in opposition to the Respondents' motion, counsel for the General Counsel contends that there are no genuine issues of material fact and requests that the Board find, as a matter of law, that the Respondents violated Section 8(a)(1) by maintaining the Booklet and Agreement because they would reasonably be interpreted by employees to preclude them from, or restrict them in, filing unfair labor practice charges with the Board.

As indicated above, at the time the charge and the amended charges were filed, the issue whether maintenance of a facially neutral work rule or policy violated Section 8(a)(1) would have been resolved based on the "reasonably construe" prong of the analytical framework set forth in *Lutheran Heritage*, supra, 343 NLRB at 647. On December 14, 2017, the Board issued its decision in *Boeing,* supra, in which it overruled the "reasonably construe" prong of the *Lutheran Heritage* framework and announced a new standard that applies retroactively to all pending cases. Under the standard announced in *Boeing*, the General Counsel has not established that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law as to this complaint allegation.

Accordingly, we deny without prejudice the General Counsel's request for summary judgment, and we will

[6] See *D. R. Horton, Inc.*, 357 NLRB 2277, 2280 (2012) (observing that mandatory arbitration policy "is properly treated as the Board treats other unilaterally implemented workplace rules. In evaluating whether an employer has violated Section 8(a)(1) by maintaining such a mandatory arbitration policy, the Board . . . applies the test set forth in *Lutheran Heritage."*), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013); *Murphy Oil*, supra, 361 NLRB at 775, 786 fns. 78 & 79, 792 (applying *Lutheran Heritage* test and finding that "even assuming [mandatory arbitration policy] does not expressly prohibit the exercise of Section 7 rights, it still violates Section 8(a)(1) because employees . . . would reasonably construe it as waiving their right to pursue employment-related claims concertedly in all forums"); *U-Haul Co. of California*, 347 NLRB 375, 378 (2006) (applying *Lutheran Heritage* test and finding that mandatory arbitration policy violated Sec. 8(a)(1) because employees would "reasonably construe the broad language to prohibit the filing of unfair labor practice charges with the Board"), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). The Board overruled the "reasonably construe" prong of the *Lutheran Heritage* standard in *Boeing Co.*, 365 NLRB No. 154 (2017), but it did so *after* the Charging Party filed the initial and amended charges at issue here.

[7] In the "Statement of Undisputed Facts" in the Respondents' Motion for Partial Summary Judgment, the Respondents nowhere state that they ever informed Rodriguez that the 2011 Booklet and Agreement had been revised or rescinded.

remand this proceeding to the Regional Director for Region 31 for further action as she deems appropriate.[8]

ORDER

IT IS ORDERED that the Respondents' Motion for Partial Summary Judgment is denied.

IT IS FURTHER ORDERED that the General Counsel's request for summary judgment is denied without prejudice, and these proceedings are remanded to the Regional Director for Region 31 for further appropriate action.

Dated, Washington, D.C. December 4, 2018

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[8] In view of our determination herein, we find it unnecessary to address the Respondents' argument that the General Counsel's request for summary judgment is procedurally improper under Sec. 102.24(a) of the Board's Rules and Regulations.